

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:10-HC-2151-BO

UNITED STATES OF AMERICA,)
Petitioner,)
)
v.)
)
WALTER WOODEN,)
Respondent.)

O R D E R

Petitioner brought this action pursuant to Title 18 of the United States Code, Section 4248(a), seeking the Court's determination that Respondent Walter Wooden ("Mr. Wooden" or "Wooden") is a "sexually dangerous person" who, instead of being released following his incarceration, should be subject to mandatory civil commitment for mental treatment. Enacted as part of the Adam Walsh Child Protection and Safety Act of 2006 ("the Adam Walsh Act" or "§ 4248"), section 4248 requires the civil commitment of certain individuals who are determined to be sexually dangerous to others. 18 U.S.C. § 4248(a). To order such commitment, a court must conclude, after an evidentiary hearing at which the Government bears the burden of proof by clear and convincing evidence, that the respondent is a "sexually dangerous person" as defined by the Adam Walsh Act. If the court finds that the Government has satisfied that burden, the individual must be committed to a suitable facility for mental treatment until he is determined to no longer be sexually dangerous to others. 18 U. S. C. § 4248(d).

Pursuant to § 4247(d) of the Adam Walsh Act, the Court

conducted an evidentiary hearing in this matter on July 11 and 12, 2011. On July 19, 2011, the Court directed the parties to submit Proposed Findings of Fact and Conclusions of Law. The parties' submissions have now been filed and reviewed by the Court.

After considering the complete evidentiary record, including the testimony introduced at the evidentiary hearing as well as the parties' filings, this Court concludes that the Government has failed to establish by clear and convincing evidence that Respondent is sexually dangerous to others as required by the Act and the United States Constitution. In support of that conclusion, and pursuant to Federal Rule of Civil Procedure 52(a), the Court enters the following findings of fact and conclusions of law.

I. SUMMARY¹

Walter Wooden is 55 years of age.² Mr. Wooden is a lifelong resident of Washington, D.C.³ Mr. Wooden has brothers and sisters.⁴

Between age 8 and age 10, Mr. Wooden was sodomized by a man in his neighborhood after he helped the man do some work in the man's

¹The parties prepared a notebook of exhibits which was offered and accepted into evidence by this Court. The exhibits are referred to by exhibit tab number. Reference to a specific page within an exhibit is referred to by the bates number or document page number.

²Transcript of evidentiary hearing of July 11 and 12, 2011 ("Tr.") at 50.

³Tr. at 85.

⁴Tr. at 88; Ex. 18 at Bates 652.

house.⁵ Mr. Wooden never told his parents because he was afraid that his father would kill the man and end up in jail.⁶

Mr. Wooden has spent "most of [his] life in prison."⁷ As a teenager in 1972, Mr. Wooden sodomized two young boys that he knew from his neighborhood after they asked him for money. He was 15 to 16 years old at the time.⁸ Wooden sustained another juvenile adjudication for enticing a minor based on his child molestation of a minor male on October 16, 1973.⁹

In 1975 Wooden was convicted upon a plea of guilty to taking indecent liberties with a minor based on Wooden's molestation of a four year old boy.¹⁰ According to the two-count grand jury indictment, on July 18, 1974, Wooden did take and attempt to take indecent liberties with the four year old child.¹¹ According to the presentence report, the victim told police that Wooden grabbed him and forced him into an alley at the rear of the victim's home.¹² Wooden forced the victim to face a wooden fence while Wooden

⁵Tr. at 89-90.

⁶Tr. at 90.

⁷Tr. at 85.

⁸Tr. at 99-113, 115; Ex. 17 at Bates 3093; Ex. 18 at Bates 651.

⁹Tr. at 113.

¹⁰Ex. 18.

¹¹Ex. 13.

¹²Ex. 18 at Bates 652.

inserted his thumb into the complainant's rectum.¹³ Wooden cut his hand on a piece of glass during the assault and then fled the scene.¹⁴ The complainant reported the assault to his father and his father called the police.¹⁵ Police officers traced Wooden to the Rogers Hospital and arrested him.¹⁶ According to the PSR, Wooden read and agreed to the statement of facts and was unwilling or unable to explain why he committed the offense.¹⁷ The presentence report writer noted that during the interview Wooden sat silently and was unresponsive to most questions.¹⁸ Wooden was sentenced to 10 years imprisonment.¹⁹

Wooden was paroled into the community on November 20, 1980, after serving seven years of his ten-year sentence.²⁰ Wooden was then convicted in 1984 based on his guilty plea to sodomy, enticing a minor, and attempting to entice another minor involving two minors.²¹

¹³Id.

¹⁴Id.

¹⁵Id.

¹⁶Id.

¹⁷Id.

¹⁸Id.

¹⁹Ex. 11 at Bates 2020.

²⁰Ex. 17 at Bates 3094.

²¹Ex. 17 at Bates 3090.

One minor, an eight year old boy, reported on July 14, 1983 that Wooden offered him \$1.00 to help Wooden move boxes.²² Wooden took the eight-year-old boy to an abandoned garage, held his head against a wall and anally and orally sodomized the boy before releasing him.²³

The other minor, a 12 year-old boy, reported that on August 16, 1983, Wooden approached the boy saying "Let's go inside and get on these boxes."²⁴ Wooden then took the boy to an abandoned building.²⁵ When the boy saw no boxes and that the location was empty he became suspicious and began to run.²⁶ A struggle ensued during which the boy grabbed a stick and began fighting Wooden off.²⁷ Wooden released the boy after becoming startled by a passerby.²⁸

The boy escaped and notified police.²⁹ The boy then picked Wooden out of a photo lineup.³⁰ Officers arrested Wooden days later

²²Ex. 17 at Bates 3091.

²³Id.

²⁴Ex. 17 at Bates 3092.

²⁵Id.

²⁶Id.

²⁷Id.

²⁸Id.

²⁹Id.

³⁰Id.

and he confessed to the arresting officers that he took the boy to the basement of 1011 7th St., S.E. to have sex with the boy.³¹ Wooden also admitted he put his hand over the boy's mouth to prevent the boy from making noise.³² For his 1984 convictions, Wooden was sentenced to 25 years imprisonment.³³

Wooden was released on parole after serving 18 years of his sentence.³⁴ Upon being paroled, Wooden was interviewed by Court Services Offender Supervision Agency ("CSOSA") Community Supervision Officer Eric Mays and admitted that he had victimized at least 20 children.³⁵

Mr. Wooden's parole was revoked on May 21, 2001, for failure to carry out supervision officer instructions and failure to cooperate with those responsible for supervision.³⁶ Wooden was paroled once more on July 25, 2002, and was ordered to undergo long-term sex offender testing and treatment.³⁷

Mr. Wooden remained in treatment in the community until July 2005 when he was arrested for having violated his parole for

³¹Id.

³²Id.

³³Ex. 16.

³⁴Ex. 27.

³⁵Ex. 41 at Bates 4069.

³⁶Ex. 19 at Bates 2047.

³⁷Ex. 40 at Bates 4783.

allegedly having sexual contact with a minor and for having contact with minors in violation of the conditions of his parole.³⁸ Following a contested parole revocation hearing, Mr. Wooden's parole was revoked and he was sentenced to a term of incarceration.³⁹

On July 15, 2010, Mr. Wooden was certified as a sexually dangerous person under the Adam Walsh Act, three months before he was due to be released from prison.⁴⁰

II. LEGAL STANDARDS

A. Constitutional Standards

1. Section 4248 Violates Equal Protection As Applied to Mr. Wooden

For the reasons set forth in the undersigned's Order of July 1, 2011, in *United States v. Timms*, 5:08-HC-1256-BO (E.D.N.C. July 1, 2011), the Court similarly finds that the Respondent here has been deprived of equal protection of the law. Such equal protection is guaranteed by the Fourteenth and Fifth Amendments of the United States Constitution.

2. The Government Has Applied Section 4248 In A Manner That Has Deprived Mr. Wooden Of Due Process Of Law

This Court also finds that Respondent has been deprived of his due process rights under the Fifth Amendment of the United States

³⁸Ex. 25 at Bates 3113.

³⁹Id.

⁴⁰CM/ECF Docket Entry # 1.

Constitution because the Government failed to bring Respondent before the Court for a civil commitment hearing within a reasonable time. *United States v. Timms*, 5:08-HC-1256-BO (E.D.N.C. July 1, 2011).

B. Standard For Civil Commitment Under The Adam Walsh Act

To commit Respondent, the Government must prove by clear and convincing evidence that Respondent is a "sexually dangerous person," which the Act defines as "a person who has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others." 18 U.S.C. § 4247(a)(5). An individual is "sexually dangerous to others" under the Act if he "suffers from a serious mental illness, abnormality or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released." 18 U.S.C. § 4247(a)(6).

As to the third, "serious difficulty" prong of the Act's three-pronged test, the Court finds that this requirement is a direct legislative enactment of the principle of volitional impairment enunciated in *Kansas v. Hendricks*, 521 U.S. 346 (1997) and *Kansas v. Crane*, 534 U.S. 407 (2002).⁴¹ In *Crane*, the Supreme Court stated that the "serious difficulty" requirement is intended to distinguish the "dangerous sexual offender whose mental illness,

⁴¹See H.R. Rep. No. 109-218(1) Section-by-Section Analysis and Discussion § 511.

mental abnormality or mental disorder subjects him to civil commitment from the dangerous, but typical, recidivist convicted in an ordinary criminal case who, having been convicted and punished for one crime, proceeds through his own free choice to commit another.”⁴²

A finding of dangerousness is also constitutionally required.⁴³ The Court finds that in this regard, the Adam Walsh Act and due process considerations require that, in addition to volitional impairment, the Government must prove by clear and convincing evidence that Respondent poses a risk of re-offense that is significant enough to justify a finding that Respondent is sexually dangerous and therefore can be preventively detained.⁴⁴

⁴²Crane, 534 U.S. at 413.

⁴³*Id.* at 407-409, 410 (stating “we have consistently upheld involuntary commitment statutes . . . [when] (1) the confinement takes place pursuant to proper procedures and evidentiary standards; (2) there is a finding of ‘dangerousness either to one’s self or others,’ and (3) proof of dangerousness is ‘coupled . . . with the proof of some additional factor, such as a ‘mental illness’ or “mental abnormality”’ (citing *Kansas v. Hendricks*, 521 U.S. 346, 357-58 quotations omitted)). See also *Foucha v. Louisiana*, 504 U.S. 71, 82-83 (1992).

⁴⁴It has been urged by the Government that it “need not establish that the person it seeks to commit will, or is likely to, reoffend.” (Pet.’s Findings of Fact and Conclusions of Law ¶ 96.) Because the Government’s position is at odds with the Constitution as interpreted by the Supreme Court cases of *Crane*, *Hendricks*, and *Foucha*, the Court rejects the Government’s position. Those cases stand for the constitutional principle that to commit Respondent, clear and convincing evidence must show that he poses a risk of re-offense that is significant enough to justify a finding that he is sexually dangerous and therefore can be preventively detained. To the extent the Government urges the Court to apply any lower

In this case the Government has proven neither. The evidence in this case does not demonstrate that Respondent currently suffers from a "serious mental illness, abnormality or disorder" which diminishes Mr. Wooden's volitional capacity. The record evidence, including but not limited to the recidivism rates proposed by the Government's experts, fail to establish that Mr. Wooden is likely to re-offend. Moreover, a fair read of the actuarial assessments reveals that individuals with similar scores to that of Mr. Wooden are highly unlikely to re-offend. Further, even if this Court were to credit the Government's experts regarding Mr. Wooden's likelihood of recidivism, the statistical evidence presented does not rise to the level of clear and convincing evidence of dangerousness sufficient to justify commitment.

III. EVIDENTIARY RECORD

A. The Testimony Of Walter Wooden

The Respondent, Walter Wooden, was called to testify by the Government over the objection of Respondent's counsel.⁴⁵ During his testimony on July 11, 2011, Mr. Wooden was questioned repeatedly regarding the facts surrounding his offenses against young boys in the 1970s and 1980s. Mr. Wooden testified at times that he did not recall the incidents, at times that he did not want to discuss the

evidentiary hurdle to civilly commit the Respondent, that request is denied.

⁴⁵Tr. at 85.

incidents, at times that he wished to invoke the Fifth Amendment, and at times he insisted that he be allowed to discuss the events in 2005 that led to his arrest and re-incarceration. His testimony was punctuated by long pauses between questions and answers and by Mr. Wooden's allegations that the prosecutor was trying to trick him and/or confuse him concerning the dates of his prior offenses.

During the continuation of his testimony on July 12, 2011,⁴⁶ Mr. Wooden acknowledged his involvement in all of the sexual offenses for which he had been previously convicted.⁴⁷ He testified that he was trying to put those things behind him and to not think about little boys any more.⁴⁸ He testified that he had "nightmares all night" prior to coming to court that day because he was feeling very bad about what he had done in the past. He testified that he resisted answering the Government counsel's questions the previous day because he did not want "to be up on the stand crying."⁴⁹

Mr. Wooden testified that he did not molest a boy while in sex offender treatment in 2005 during his latest release on parole.⁵⁰ Mr. Wooden testified that he befriended the boy and helped him with

⁴⁶Tr. at 144.

⁴⁷Tr. at 155.

⁴⁸Id.

⁴⁹Tr. at 157.

⁵⁰Tr. at 147.

his homework when other adults were around.⁵¹ The child reminded him of himself when he was a young boy because others picked on the child and called him the devil just as they had Mr. Wooden when he was a young boy.⁵² The boy's mother was a crack addict and his father had been to prison.⁵³ Therefore, Mr. Wooden testified, he felt sorry for the boy. Mr. Wooden testified that he only dreamed he molested the boy, and that he reported this dream to his therapist, Dr. Weiner, to make sure it was only a dream.⁵⁴ After he was locked up he sent the child a Christmas card because he considered the child a friend.⁵⁵

Mr. Wooden testified that he has changed as a person.⁵⁶ He admitted that he had molested boys in the past and that he was wrong to have done so.⁵⁷ Mr. Wooden testified that he was no longer interested in having sex with young boys.⁵⁸ He no longer believes that if a young boy asks him for money that the boy wants to have

⁵¹Tr. at 150.

⁵²Tr. at 25.

⁵³Id.

⁵⁴Tr. at 97.

⁵⁵Tr. at 150.

⁵⁶Tr. at 155.

⁵⁷Id.

⁵⁸Tr. at 158.

sex with him.⁵⁹

B. The Government's Experts

The Government offered testimony and forensic reports from two forensic psychologists who evaluated Mr. Wooden and concluded that he meets the criteria for civil commitment under the Adam Walsh Act—Dr. Hy Molinek and Dr. Heather Ross.

1. Dr. Hy Molinek

The first of the Government's experts to testify was Dr. Hy Molinek, a forensic psychologist whose practice is primarily devoted to the evaluation of sex offenders in the state of California.⁶⁰ Approximately 70% of his work involves assessing sex offenders' recidivism risks.⁶¹ Dr. Molinek was retained by the Government to perform a risk assessment of Walter Wooden and to determine whether he meets the criteria for commitment under the Adam Walsh Act.⁶² Dr. Molinek has concluded that Mr. Wooden does meet the criteria for commitment.⁶³

Dr. Molinek was not permitted to interview Mr. Wooden, but he was provided a number of records that he used to conduct his

⁵⁹Id.

⁶⁰Tr. at 7-8.

⁶¹Tr. at 8.

⁶²Tr. at 12.

⁶³Ex. 2 at Bates 3337.

evaluation.⁶⁴ The records included prison records, court judgments, and the treatment records of Dr. Ronald Weiner.⁶⁵ Dr. Malinek referred to the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR) classification system, and determined that Mr. Wooden has the following: pedophilia, sexually attracted to males, probably exclusive and antisocial personality disorder.⁶⁶ Dr. Malinek provided some explanation of the characteristics and criteria for pedophilia and antisocial personality disorder according to the DSM-IV-TR.⁶⁷

In arriving at his diagnosis of pedophilia, Dr. Malinek relied on Mr. Wooden's history of sexual-offense convictions, noting Mr. Wooden's behavior dated back to his teens in the 1970s and continued through 2005 when his parole was revoked for yet another sexual assault or attempted sexual assault of a seven-year-old boy.⁶⁸ Dr. Malinek described Mr. Wooden's pedophilia as chronic and lifelong based on the DSM-IV description of pedophilia.⁶⁹ He noted that Mr. Wooden has committed another sex offense each time that he has been released from incarceration since his teens. Most

⁶⁴Ex. 2 at Bates 3298-3300.

⁶⁵Id.

⁶⁶Ex. 2 at Bates 3320.

⁶⁷Ex. 2 at Bates 3320-3322.

⁶⁸Tr. at 29.

⁶⁹Id.

recently, in 2005, he committed a sex offense while in treatment and on parole. Dr. Malinek described Mr. Wooden's performance in treatment as a failure.

Dr. Malinek testified that he used an empirically guided clinical approach to assessing Mr. Wooden's risk of recidivism.⁷⁰ This approach involved using actuarial instruments and assessing certain dynamic factors. He used three actuarial instruments to assess Mr. Wooden's risk of recidivism.⁷¹ He used the Static-99R, the Static-2002R, and the MnSOST-R.⁷² Dr. Malinek determined that Mr. Wooden's score of 7 on the Static-99R placed him in the high risk category.⁷³ He decided to only compare Mr. Wooden to other individuals with a score of 7 in the high risk group of prior sex offenders.⁷⁴ He concluded that persons with Mr. Wooden's score of 7 had a 37.9% chance of committing another sex offense within 5-7 years and a 48.6% chance of re-offending within 10 years based on the recidivism rates of the high risk group.⁷⁵

Dr. Malinek employed a Static-2002R analysis and found that Mr. Wooden had a total score of 9, placing him between the 96.4 and

⁷⁰Tr. at 65.

⁷¹Id.

⁷²Ex. 2 at Bates 3323, 3326, 3329.

⁷³Tr. at 37.

⁷⁴Ex. 2 at Bates 3326.

⁷⁵Id.

98.9 percentiles of recidivism among sex offenders.⁷⁶ He also rated Mr. Wooden's risk of sexually re-offending with the MnSOST-R.⁷⁷ Mr. Wooden's background and history resulted in a score of 17 which placed him in the very high risk range with a 40% probability of re-offending in 5-7 years.⁷⁸

Dr. Malinek also considered several dynamic factors in determining Mr. Wooden's likelihood of re-offending.⁷⁹ He considered such factors as significant negative social influences, capacity for relationship stability, emotional identification with children, lifestyle impulsiveness, poor problem solving skills, grievance/hostility, offensive-supportive attitudes, sex drive/sexual preoccupations, deviant sexual interests, as well as resistance to rules and supervision.⁸⁰ With the exception of age, Dr. Malinek found all of these factors weighed against Mr. Wooden's ability to refrain from committing another sexual offense.⁸¹ Dr. Malinek conceded that with the exception of noncompliance with supervision, there is a very low correlation between the dynamic

⁷⁶Ex. 2 at Bates 3327.

⁷⁷Ex. 2 at Bates 3329.

⁷⁸Ex. 2 at Bates 3329-3330.

⁷⁹Ex. 2 at Bates 3330-3335.

⁸⁰Id.

⁸¹Ex. 2 at Bates 3335-3336.

factors he considered and increased recidivism.⁸² Nevertheless, Dr. Malinek considered those weakly-correlated factors in assessing Mr. Wooden's risk and arriving at his final opinion that Mr. Wooden should be committed.⁸³

Dr. Malinek treated the 2005 finding by the parole hearing officer that Mr. Wooden had sexual contact with a seven-year-old boy as persuasive.⁸⁴ He credited the finding even though no charges had been filed against Mr. Wooden.⁸⁵

After observing Mr. Wooden's testimony at the hearing, Dr. Malinek was called back to the witness stand for rebuttal.⁸⁶ He added that he initially thought that Mr. Wooden was retarded based on his inability to answer the Government counsel's questions. He opined that Mr. Wooden's IQ is probably in the mid to low 70s and perhaps as low as the 60s.⁸⁷ He acknowledged that the treatment for a sex offender who is mentally retarded requires a highly specialized program, which is available in California.⁸⁸ But Dr. Malinek is not aware of any such program within the Bureau of

⁸²Tr. at 68.

⁸³Tr. at 48, 69, 71.

⁸⁴Ex. 2 at Bates 3337.

⁸⁵Tr. at 73.

⁸⁶Tr. at 272.

⁸⁷Tr. at 280.

⁸⁸Tr. at 283-84.

Prisons.⁸⁹ He disagreed with a number of Dr. Campbell's methods and conclusions.⁹⁰

2. Dr. Heather Ross

Dr. Heather Ross is a psychologist who is employed by the Bureau of Prisons to perform forensic evaluations of sex offenders.⁹¹ She conducted an evaluation Walter Wooden in February 2010 utilizing documents that were made available through the Bureau of Prisons central file.⁹² Mr. Wooden declined to be interviewed for her evaluation.⁹³ Under Dr. Ross's analysis, Mr. Wooden scored a 7 on the Static-99R.⁹⁴ When comparing Mr. Wooden to a group of offenders in the pre-selected for treatment group, individuals with a score of 7 recidivated over 5 years at a rate of 24.5% and over 10 years at a rate of 33.3%.⁹⁵ When comparing Mr. Wooden's score of 7 to the high risk/need group, the rate of recidivism at five years is 37.9% and at ten years it is 48.6%.⁹⁶

⁸⁹Tr. at 284.

⁹⁰Tr. at 273-76.

⁹¹Tr. at 179-180.

⁹²Ex. 4 at Bates 3143. Dr. Ross supplemented her report of February 16, 2010, with an additional Forensic Evaluation dated March 8, 2011. Ex. 5.

⁹³Ex. 5 at Bates 3282.

⁹⁴Ex. 5 at Bates 3294.

⁹⁵Id.

⁹⁶Id.

She also scored Mr. Wooden using the SVR-20.⁹⁷ Dr. Ross found that Mr. Wooden met the criteria for commitment under the Adam Walsh Act and recommended that he be committed.

Dr. Ross testified that although it was requested, she never received or viewed a videotape of Mr. Wooden's interview regarding the alleged sexual assault of a seven-year-old boy that resulted in his parole being revoked in July, 2005.⁹⁸

C. Evidence Related To The 2005 Parole Revocation

Mr. John Taberski is a United States Parole Officer who testified for the Government.⁹⁹ Officer Taberski testified that in 2005 he was a Community Supervision Officer and he supervised Mr. Wooden briefly after Mr. Wooden moved into his district.¹⁰⁰ Officer Taberski testified that in "mid May" of 2005, he called Mr. Wooden to remind him of an upcoming maintenance polygraph exam.¹⁰¹ Officer Taberski testified that Mr. Wooden "refused" to take the polygraph.¹⁰²

Officer Taberski testified to following up on a call from Dr.

⁹⁷Ex. 5 at 3296.

⁹⁸Tr. at 198.

⁹⁹Tr. at 159.

¹⁰⁰Tr. at 160.

¹⁰¹Tr. at 160-61.

¹⁰²Tr. at 161.

Weiner, Mr. Wooden's therapist.¹⁰³ Dr. Weiner indicated that during therapy, Mr. Wooden disclosed an instance of his molesting a young boy in his apartment building.¹⁰⁴ Officer Taberski then attended a staffing meeting with several people, including Mr. Wooden, Officer Paul Brennan, and Dr. Weiner.¹⁰⁵ At the meeting, Dr. Weiner, in Mr. Wooden's presence, explained to Officers Taberski and Brennan what Mr. Wooden had revealed during therapy.¹⁰⁶ Mr. Wooden agreed with Dr. Weiner's recitation of the facts.¹⁰⁷ Wooden did not claim that he had dreamed the encounter.¹⁰⁸ Officer Taberski later asked Wooden to identify the seven-year-old and Wooden refused.¹⁰⁹

D. Respondent's Expert

The Respondent relied on the testimony and evaluation of Dr. Terence Campbell. Dr. Campbell is a board certified forensic psychologist.¹¹⁰ He has published two books on the subject of assessing sex offenders and over 40 articles in peer reviewed

¹⁰³Tr. at 166.

¹⁰⁴Tr. at 166-67.

¹⁰⁵Tr. at 167.

¹⁰⁶Id.

¹⁰⁷Tr. at 167.

¹⁰⁸Tr. at 168.

¹⁰⁹Tr. at 168-69.

¹¹⁰Ex. 7 at Bates 277.

journals.¹¹¹ He has testified numerous times in state civil commitment proceedings.¹¹² This case is Dr. Campbell's first proceeding arising under the Adam Walsh Act.¹¹³

Dr. Campbell conducted an in-person interview and evaluation of Walter Wooden at the request of Mr. Wooden's attorneys.¹¹⁴ Based on his examination, Dr. Campbell is of the opinion that Mr. Wooden does not struggle with issues of volitional control and does not suffer from pedophilia or antisocial personality disorder.¹¹⁵ Dr. Campbell also scored Mr. Wooden using the Static-99R and the Static-2002R actuarial instruments. Dr. Campbell concluded that Mr. Wooden does not meet the criteria for commitment under the Adam Walsh Act.¹¹⁶

Dr. Campbell administered a test called the "Barratt Impulsiveness Scale" to determine whether Mr. Wooden struggles with volitional control.¹¹⁷ Mr. Wooden's score of 48 on the Scale was

¹¹¹Ex. 7 at Bates 279.

¹¹²Tr. at 203.

¹¹³Id.

¹¹⁴Ex. 8; Tr. at 205.

¹¹⁵Ex. 8 at Bates 20; 23; 65.

¹¹⁶Ex. 8 at Bates 65.

¹¹⁷Tr. at 208, 212. Impulsiveness can be conceptualized as "a predisposition toward rapid, unplanned reactions to internal or external stimuli without regard to the negative consequences of these reactions to the impulsive individuals or to others." Ex. 8 at Bates 25, n.29 (citing M.S. Sanford et al., *Fifty Years of the Barratt Impulsiveness Scale: An Update and Review*, 47 PERSONALITY AND

"far below" the cutoff score for a finding of impulsiveness.¹¹⁸ Dr. Campbell's Barratt analysis compelled him to conclude that Mr. Wooden does not "exhibit . . . volitional impairment."¹¹⁹ Dr. Campbell acknowledged that the Barratt Impulsiveness Scale is typically used as a treatment tool.¹²⁰ However, Dr. Campbell believes that "[t]he Barratt Impulsiveness Scale 'is arguably the most commonly administered self-report measure specifically designed for the assessment of impulsiveness in both clinical and research settings.'"¹²¹

In addition to employing a quantitative approach to assess Mr. Wooden's risk of re-offending, Dr. Campbell also concluded that Mr. Wooden no longer suffers from pedophilia because he no longer exhibits symptoms of pedophilia.¹²² With the single exception of sending a Christmas card to an alleged victim in 2005, Mr. Wooden has shown no continued interest in children. Mr. Wooden informed Dr. Campbell that he did not molest the boy as was alleged during the revocation of his parole in 2005.¹²³ Moreover, Dr. Campbell was

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¹¹⁸Id.

¹¹⁹Tr. at 209.

¹²⁰Tr. at 250.

¹²¹Ex. 8 at Bates 25, n.29 (citing M.S. Sanford et al., *supra* note 117).

¹²²Tr. at 207-08; Ex. 8 at Bates 65.

¹²³Tr. at 207.

provided with the forensic interview of the alleged victim who indicated that Mr. Wooden did not touch him in any way.¹²⁴ Dr. Campbell found the boy's denial of any sexual contact with Mr. Wooden to be significant.

Dr. Campbell opined that Mr. Wooden made significant progress in treatment between his release in 2002 and prior to his arrest and re-incarceration in 2005.¹²⁵ Moreover, since his incarceration, Mr. Wooden had shown no interest in children, such as through the possessing and viewing of child pornography as do many men in the Maryland Unit of FCI Butner.¹²⁶ Dr. Campbell considered pedophilia to be a condition that can dissipate much like alcoholism.¹²⁷ Finally, as noted by Dr. Campbell, Mr. Wooden has shown a dramatic decline in disciplinary infractions since his incarceration in 2005 which is also consistent with the overall decline in offending with age.¹²⁸ Dr. Campbell considered age an important factor in reducing Mr. Wooden's risk of recidivism.¹²⁹

Dr. Campbell also conducted a risk assessment of Mr. Wooden

¹²⁴Ex. 8 at Bates 13.

¹²⁵Tr. at 222.

¹²⁶Tr. at 265-66.

¹²⁷Tr. at 262-63.

¹²⁸Tr. at 265.

¹²⁹Ex. 8 at Bates 22; Tr. at 262.

using the Static-99R and Static-2002R actuarial instruments.¹³⁰ He scored Mr. Wooden on the Static-99R and the Static-2002R and reached the same scores as did Dr. Malinek and Dr. Ross.¹³¹ However, Dr. Campbell is of the view that those instruments are best used to rule out recidivism rather than to rule in recidivism.¹³² In his words, the instruments are more accurate at determining the likelihood that someone will not recidivate than at determining that someone will recidivate.¹³³

Utilizing the statistics provided by the creators of the actuarial instruments, Dr. Campbell determined that the instruments have a high predictive value when determining that someone with a particular score is not likely to re-offend.¹³⁴ Dr. Campbell compared an individual with a score of 7 on the Static-99R, as Mr. Wooden has, with each of the comparison groups, which he opined was the more intellectually honest approach.¹³⁵ When considering the routine sample group, if one asserts that a person with a score of 7 will not re-offend within 5 years, that assertion will be correct

¹³⁰ Tr. 213; Ex. 8 at Bates 41.

¹³¹Tr. at 213.

¹³²Tr. at 217-18.

¹³³Tr. at 218.

¹³⁴Ex. 8 at 39.

¹³⁵Tr. at 217.

94% of the time.¹³⁶ Considering a score of 7 among the pre-selected for treatment group, if one asserts that a person in that group with a score of 7 will not re-offend within 5 years, that assertion will be correct 91% of the time.¹³⁷ Considering the non-routine sample, if one asserts that a person in that group with a score of 7 will not re-offend within 5 years, that assertion will be right 86% of the time.¹³⁸ Considering the high risk group, if one determines that a person in that group with a score of 7 will not re-offend within 5 years, one would be right 81% of the time.¹³⁹ Dr. Campbell applied the same methodology to Mr. Wooden's score on the Static-2002R with similar results.¹⁴⁰ In sum, Dr. Campbell testified that the Static-99R and Static-2002R instruments are not nearly as accurate at predicting that someone will re-offend as they are at predicting that someone will not re-offend.¹⁴¹ Applying this principle to Mr. Wooden's case, Dr. Campbell opined that the statistics favor a finding that Mr. Wooden is not likely to re-offend.

Dr. Campbell did not employ the MnSOST-R because in his

¹³⁶Tr. at 216.

¹³⁷Tr. at 217.

¹³⁸Id.

¹³⁹Id.

¹⁴⁰Ex. 8 at Bates 41.

¹⁴¹Tr. at 217.

opinion, the MnSOST-R has not held up during validation studies and some jurisdictions, including California, no longer use the instrument.¹⁴² In Dr. Campbell's opinion, there is "no peer reviewed data whatsoever available to support it."¹⁴³

Dr. Campbell noted that if Mr. Wooden had in fact molested the boy while in sex offender treatment in 2005, then his opinion regarding Mr. Wooden's difficulty in refraining from further acts of child molestation would be different.¹⁴⁴ In fact, if Mr. Wooden had molested the boy in 2005, then Dr. Campbell said he would have to conclude that Mr. Wooden should be committed.¹⁴⁵

Dr. Campbell believed that Mr. Wooden has an IQ of 70 based on his review of the records provided to him.¹⁴⁶ He also believed Mr. Wooden suffered from a mood disorder, based on his observation of Mr. Wooden's testimony in court on July 11, 2011.¹⁴⁷ A mood disorder is treatable.¹⁴⁸ Dr. Campbell also indicated, as an explanation for Mr. Wooden's struggles on the witness stand, that someone with Mr. Wooden's limited intellectual capacity would have "a great deal of

¹⁴²Ex. 8 at Bates 48-49.

¹⁴³Tr. at 227.

¹⁴⁴Tr. at 231.

¹⁴⁵Id.

¹⁴⁶Tr. at 212.

¹⁴⁷Tr. at 210.

¹⁴⁸Tr. at 270.

difficulty" with compound questions like the ones being asked in court.¹⁴⁹

Dr. Campbell also considered several dynamic factors in determining whether Mr. Wooden would have serious difficulty refraining from committing a sex offense when released. One of those factors is the environment into which Mr. Wooden would be released.¹⁵⁰ Dr. Campbell spoke with Mr. Wooden's sister Addie Wooden who indicated that Mr. Wooden would be welcome to live with her upon his release.¹⁵¹

E. Declarations

1. Declaration of Dr. Ronald Weiner

Dr. Ronald Weiner provided sworn declarations to both the Government's counsel and to Respondent's counsel.¹⁵² In his declaration for the Government, which was admitted over Respondent's objection, Dr. Weiner indicated that he provided sex offender treatment to Mr. Wooden between 2002 and 2005.¹⁵³ As he was preparing his relapse prevention plan, Mr. Wooden told Dr. Weiner that a seven year-old boy had followed Mr. Wooden into the basement laundry room of his apartment building. Mr. Wooden told Dr. Weiner

¹⁴⁹Tr. at 212.

¹⁵⁰Tr. at 229.

¹⁵¹Id.

¹⁵²Exs. 40 & 83.

¹⁵³Ex. 40.

that he and the boy removed their pants, that Mr. Wooden approached the boy from behind, that Mr. Wooden took his penis out and placed it against the boy's buttocks, and that Mr. Wooden "poked" the boy three times, but did not penetrate the boy's anus.¹⁵⁴ Mr. Wooden then gave the boy \$5.00 and told the boy to leave.¹⁵⁵ Dr. Weiner notified Mr. Wooden's parole officer and turned the matter over for investigation. Mr. Wooden did not tell Dr. Weiner initially that the incident was merely a dream.¹⁵⁶

In his declaration for the Respondent, Dr. Weiner indicated that he left on vacation shortly after Mr. Wooden's revelation about the boy in the laundry room. His assistant, Ms. Stamm took over the case. Mr. Wooden did tell Ms. Stamm that the incident with the boy in the basement was a dream.

2. Declaration of Mona Asiner

In 2005, Mr. Wooden was represented at his parole revocation hearing by attorney Mona Asiner. She indicated that Det. Linda Knight, who is an experienced forensic interviewer, interviewed Mr. Wooden's alleged victim in 2005. The child indicated to Det. Knight that Mr. Wooden did not molest him and did not touch him.¹⁵⁷

At the parole revocation hearing, Mr. Wooden denied that he

¹⁵⁴Ex. 40 at ¶ 10.

¹⁵⁵Id.

¹⁵⁶Ex. 40.

¹⁵⁷Ex. 82 at ¶ 3.

had touched the boy. Mr. Wooden also indicated that he told the parole officer and Det. Knight in a videotaped interview that he had only dreamed the incident.¹⁵⁸

Det. Knight had agreed to provide the videotaped interview at the parole revocation hearing but failed to do so. Nevertheless, the parole hearing officer found that Mr. Wooden had violated his parole by having sexual contact with the boy and by having contact with minors. The burden of proof at parole hearings is by a preponderance of the evidence.¹⁵⁹

IV. FINDINGS OF FACT

A. Prior Bad Act

It is uncontested that Mr. Wooden has engaged in child molestation in the past. Mr. Wooden engaged in acts of child molestation throughout the 1970's and as late as 1983. The Court finds that the Government has established the first element for civil commitment under the Adam Walsh Act by clear and convincing evidence.

B. Serious Mental Illness, Abnormality, or Disorder

The Court finds that the Government has not sustained its burden of showing that Mr. Wooden presently suffers from a serious mental illness, abnormality or disorder.

There is a dispute between the parties' experts as to whether

¹⁵⁸Ex. 82 at ¶ 3.

¹⁵⁹Ex. 82 at ¶ 4.

Mr. Wooden currently suffers from pedophilia and antisocial personality disorder. Dr. Hy Malinek and Dr. Heather Ross diagnosed Mr. Wooden as having pedophilia, sexually attracted to males, probably exclusive, and antisocial personality disorder.¹⁶⁰ Dr. Terence Campbell disagrees with the Government's experts.¹⁶¹ Dr. Campbell believes that although Mr. Wooden suffered from pedophilia and antisocial personality at some point in the past, Mr. Wooden does not presently suffer from a mental abnormality or personality disorder that creates a substantial risk of a sexual re-offense.¹⁶²

The nub of the dispute between these experts is whether pedophilia and antisocial personality disorder are chronic, enduring, and largely inalterable conditions, or whether, under the proper circumstances, those conditions can abate with time and/or treatment. The Government's experts take the former view, and argue that Mr. Wooden presently is afflicted with these disorders.

But the evidence in this case supports the latter view. The record reveals that Mr. Wooden's mental illnesses, although serious and life-altering at some earlier point in time, are no longer a controlling and debilitating part of Mr. Wooden's psychological makeup. To be sure, Mr. Wooden committed sex offenses against young boys in 1973, 1975, and 1983. There is sufficient evidence to find

¹⁶⁰Ex. 2; Ex. 5.

¹⁶¹Ex. 8.

¹⁶²Ex. 8 at Bates 65.

that decades ago, Mr. Wooden struggled with pedophilia and antisocial personality disorder as he acted out against society's customs and mores and molested innocent children. However, no persuasive evidence exists demonstrating that Mr. Wooden has committed any kind of sexual offense since 1983.

Mr. Wooden initially admitted and then later denied that he molested a boy in his apartment building's laundry room in 2005. On this point, the Court pauses to note Mr. Wooden's low cognitive capacity. In light of his obvious and undisputed intellectual deficits, the Court gives little weight to Mr. Wooden's 2005 "admission" of a sexual offense.

And other than the retracted admission of a man with clear cognitive deficits, there is no basis to believe that the 2005 incident actually occurred. Tellingly, the alleged victim was directly queried about the incident and denied that Mr. Wooden had "touched his private part or butt."¹⁶³ The alleged victim's response is significant, for as Dr. Campbell noted, "studies of children's response patterns [to investigatory questions] indicate that if they are directly asked, they do not deny, but tell."¹⁶⁴

In this case, the alleged victim was directly asked in a formal setting and denied that any sexual encounter occurred

¹⁶³Ex. 29 at Bates 4705.

¹⁶⁴Ex. 8 at Bates 13 (citation omitted).

between himself and Mr. Wooden.¹⁶⁵ Although Mr. Wooden's shadowy admission certainly lingers in the record of this case, and it has been considered by the Court in weighing the relevant evidence, the Court finds that the Government has not brought forth sufficient credible evidence to sustain a finding that the 2005 alleged assault occurred.¹⁶⁶ Fairly viewed, the evidence supports a finding that Mr. Wooden did not molest a child in 2005. Therefore, the Court finds, Mr. Wooden's last act of child molestation occurred in 1983.

Furthermore, the evidence shows that Mr. Wooden was in the community for three years between 2002 and 2005 without committing a sex offense.¹⁶⁷ During that time, Mr. Wooden was in treatment with Dr. Ronald Weiner. Dr. Weiner consistently reported that Mr. Wooden's progress in treatment was satisfactory to good until Mr. Wooden reported to him in June of 2005 that he had molested a boy some nine months earlier in the basement laundry room of his apartment building. Mr. Wooden cooperated during the subsequent investigation. He reported to the investigator and to Dr. Weiner's

¹⁶⁵Ex. 29 at Bates 4705.

¹⁶⁶The Court grounds its finding that the 2005 assault did not occur not on the absence of any conviction, but rather on the absence of any corroborating evidence that the event in question occurred coupled with the relevant information cited by Dr. Campbell regarding children's admissions to instances of molestation.

¹⁶⁷Ex. 41.

assistant, Ms. Stamm, that it was a dream. The Court finds that Mr. Wooden's conduct while in the community between 2002 and 2005 supports a finding that his mental illnesses have subsided with time.

Dr. Campbell finds persuasive the fact that Mr. Wooden has not shown any interest in child pornography or other sexual outlets that have been used by other child molesters as persuasive support for his assessment of Wooden's present mental condition. Dr. Malinek, on the other hand, opines that some molesters are simply not interested in child pornography. Dr. Malinek's point is well taken. However, considering that his last act of child molestation occurred in 1983, that he was free in the community for three years without re-offending, that during the last six years while incarcerated there have not been any infractions involving any type of sexual deviancy, this Court finds that the Government has not shown by clear and convincing evidence that Mr. Wooden continues to suffer from pedophilia.

Moreover, the Court finds that the Government has not brought forth clear and convincing evidence that Mr. Wooden presently satisfies the criteria for a diagnosis of antisocial personality disorder, a condition characterized by "a pervasive pattern of disregard for, and violation of, the rights of others that begins

in childhood or early adolescence and continues into adulthood."¹⁶⁸

Doctor Ross cites Mr. Wooden's criminal history, his deceitfulness, his irritability, his reckless disregard for the personal safety of the victims of his past sexual abuse, and his lack of remorse in support of a diagnosis of Mr. Wooden's antisocial personality disorder.¹⁶⁹ But Dr. Ross's opinion focuses largely on stale historical factors to the exclusion of Mr. Wooden's present mental condition. Moreover, Dr. Ross's analysis was clouded by her acceptance of the allegation of the 2005 sex-offense as true. As a result of this backward-looking and factually unsupported analysis, which was employed by Dr. Malinek as well, the Government's experts failed to properly analyze one of the most salient factors contributing to Mr. Wooden's present psychological condition: his age.

At age 55, as noted by Dr. Campbell, Mr. Wooden's antisocial

¹⁶⁸DSM-IV-TR, 645-50. The Court notes that approximately half of the male prison population is diagnosable with antisocial personality disorder. Moran, *The Epidemiology of Antisocial Personality Disorder*, 34 SOCIAL PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 231, 234 (1999). Given the disorder's widespread prevalence in American prisons, it seems unlikely that Congress intended for antisocial personality disorder to be considered a "serious mental illness, abnormality or disorder" that could subject an individual to civil commitment. To that end, the Court does not believe that an independent diagnosis of antisocial personality disorder qualifies as a "serious mental illness, abnormality or disorder" under the Adam Walsh Act. Nevertheless, since evidence of Mr. Wooden's antisocial personality disorder and pedophilia has been introduced in this case, the Court has considered that evidence in light of the applicable legal standards.

¹⁶⁹Ex. 5 at Bates 3292.

personality disorder has likely abated to such an extent that it can no longer fairly be termed a "serious mental illness" within the meaning of the Adam Walsh Act.¹⁷⁰ And the abatement of Mr. Wooden's antisocial personality disorder is in fact borne out by the record. For instance, Mr. Wooden's decreasing frequency of disciplinary infractions as he has grown older in prison demonstrates that Mr. Wooden's antisocial personality disorder is substantially diminishing over time, if it hasn't already disappeared entirely. As Dr. Campbell articulated, "we see evidence demonstrating that this is not the defiant, acting out man in the 21st century that he was in the 1970's and 1980's and even into the 1990's."¹⁷¹

Given the relevant literature cited in Dr. Campbell's report, the Court finds that a thorough consideration of age is essential to any credible analysis of an individual's present mental health.¹⁷² The Government seemed to acknowledge this principle, as when Dr. Malinek attested to the "inverse relationship between age and recidivism."¹⁷³ But the Government's expert's largely glossed-

¹⁷⁰Ex. 8 at Bates 22-23.

¹⁷¹Tr. at 225.

¹⁷²Ex. 8 at Bates 22-23.

¹⁷³Tr. at 35. Although the Government's experts scored Mr. Wooden's age appropriately on the Static-99R and Static-2000R, outside of the actuarials, those experts did not provide any meaningful explanation on how the powerful predictor of age applied in Mr. Wooden's case.

over Mr. Wooden's age in their application of that principle to Mr. Wooden's case. Because the Government's experts either omitted or discounted a discussion of Mr. Wooden's age in arriving at their conclusions regarding Mr. Wooden's antisocial personality disorder, the Court must discount the opinions of the Government's experts as well.

The Court finds as credible and gives controlling weight to the testimony of Dr. Terence Campbell regarding the Respondent's present lack of a serious mental illness, abnormality, or disorder that is likely to lead to Mr. Wooden's sexual recidivism. The Court finds that Mr. Wooden either does not presently suffer from a serious mental illness, abnormality, or disorder, or, to the extent a mental illness, abnormality, or disorder is present, it is not "serious" within the meaning of the Adam Walsh Act.

C. Serious Difficulty Refraining From Sexually Violent Conduct or Child Molestation

The Court has found that the Respondent does not have a "serious mental illness, abnormality or disorder" within the meaning of 18 U.S.C. § 4247(a)(6). The Government, therefore, has failed to meet its burden at the second prong of the Adam Walsh analysis. However, even assuming, *arguendo*, that a finding of a "serious mental illness, abnormality or disorder" were sustainable, the Court finds that the Government's case would still fail on the third and final prong of the analysis.

In order to commit Mr. Wooden, the Government must prove that

Mr. Wooden's mental disorder(s) result in his "serious difficulty refraining from sexually violent conduct or child molestation if released." 18 U.S.C. § 4247(a)(6). As discussed previously, this term implies a volitional impairment.

On the subject of volition, the DSM-IV-TR is clear that the fact that someone has been diagnosed with a mental illness or disorder does not answer the question of whether that person's volition is impaired. The manual states:

It is precisely because impairments, abilities and disabilities vary widely within each diagnostic category that assignment of a particular diagnosis does not imply a specific level of impairment or disability. The fact that an individual's presentation meets the criteria for DSM diagnoses does not carry any necessary implications regarding the individual's degree of control over the behaviors that may be associated with the disorder. Even when diminished control over one's behavior is a feature of the disorder, having the diagnosis in itself does not demonstrate that a particular individual is or was unable to control his or her behavior at a particular time.

DSM-IV-TR at xxxiii.

Unfortunately, there are no uniform criteria or assessment procedures to evaluate volitional impairments in criminal/civil forensic psychological assessments.¹⁷⁴ That said, Dr. Campbell administered the Barratt Impulsiveness Scale in an attempt to meaningfully assess the issue of Mr. Wooden's volitional capacity.¹⁷⁵ Although the scale is typically used for treating, it

¹⁷⁴Ex. 8 at Bates 25.

¹⁷⁵Tr. at 208.

is the best tool of which Dr. Campbell is aware that actually measures one's ability to exercise control.¹⁷⁶ Mr. Wooden's score of 48 on the Barratt placed him well below the cutoff for high impulsiveness.¹⁷⁷

Dr. Malinek disagreed with Dr. Campbell's use of the Barratt Impulsiveness Scale as a valid means of assessing Mr. Wooden's volitional control.¹⁷⁸ Dr. Malinek was circumspect because the Barratt is a self-report instrument and therefore it is potentially open to manipulation by the subject.¹⁷⁹ However, compared to Dr. Campbell's analysis of the issue of volition, Dr. Malinek's opinion is scant. Dr. Campbell's approach, although perhaps imperfect, at least addressed the issue of volitional capacity in a rational manner. Moreover, Dr. Campbell's opinion rested firmly on the facts, while Dr. Malinek's opinion rested, in part, upon a surmise.

Dr. Malinek incorrectly concluded that Mr. Wooden molested the seven-year-old boy in 2005. Apparently swayed by that false premise, the doctor concluded that Mr. Wooden had a "powerful volitional impairment."¹⁸⁰ Dr. Malinek's opinion on Wooden's volitional capacity, as thinly-supported and grounded in an

¹⁷⁶Tr. at 250.

¹⁷⁷Ex. 8 at Bates 26.

¹⁷⁸Tr. at 275.

¹⁷⁹Id.

¹⁸⁰Ex. 2 at Bates 3337.

unsustainable factual basis as it is, is not entitled to the same weight as Dr. Campbell's opinion.

Dr. Malinek and Dr. Campbell are in agreement that Mr. Wooden has poor cognitive and problem solving abilities. In Dr. Malinek's view, because of Mr. Wooden's significant cognitive limitations, Mr. Wooden just "doesn't quite get it."¹⁸¹ The Court agrees with the experts' observations of Mr. Wooden's cognitive limitations, but disagrees with Dr. Malinek insofar as he believes that Mr. Wooden's impaired cognition leads to a lack of volitional control.

Mr. Wooden's cognitive limitations merely compel this Court to discount Mr. Wooden's testimony. Having thoroughly observed Mr. Wooden on the witness stand, the Court finds that Mr. Wooden is a poor historian, that his cognition is markedly impaired, and that he has difficulty in understanding and adequately responding to complex questioning. Mr. Wooden's testimony, as a whole, is not entitled to significant weight.

With Mr. Wooden's testimony discounted, the Court is left with conflicting testimony regarding Mr. Wooden's volitional control. Faced with this conflicting testimony, the Court finds as more persuasive the analysis of Mr. Wooden's volitional control articulated by Dr. Campbell. Dr. Campbell's analysis focused on Mr. Wooden's present, as opposed Mr. Wooden's historical, volitional

¹⁸¹Tr. at 282.

capacity.¹⁸² The Court finds that Dr. Campbell's framing of the issue comports with the Adam Walsh Act's requirement that a person be committed only "if the person *is* a sexually dangerous person." 18 U.S.C. § 4248(d) (emphasis added). The Government experts' retrospective analysis of Mr. Wooden's mental illnesses would be entitled to controlling weight only if the Adam Walsh Act allowed the commitment of a person who "*was* sexually dangerous" at some prior point in time. That is plainly not what the Adam Walsh Act requires. See 18 U.S.C. § 4248(d). Dr. Campbell, not the Government's experts, has more properly addressed the issue of volition before the Court.

Dr. Campbell, in part relying on the Barratt Impulsiveness Scale, opined that Mr. Wooden does not presently have a volitional impairment that would interfere with his ability to refrain from sexually violent conduct or child molestation. The Court finds that Dr. Campbell's opinion is grounded in a more nuanced and thorough understanding of Mr. Wooden's psychological constitution, and that Dr. Campbell's opinion is therefore entitled to controlling weight. Dr. Campbell analyzed Mr. Wooden's volitional capacity in an individualized and tailored manner, addressing the statutory issue head-on with the Barratt Impulsiveness scale. But Dr. Malenik, on the other hand, applied a more wooden historical analysis of Mr. Wooden's volition, an analysis based largely on decades-old

¹⁸²Tr. at 207.

criminal convictions and an alleged 2005 sexual offense that the Court finds as a matter of fact did not occur.

Accordingly, this Court finds that the Government has not shown by clear and convincing evidence that Respondent currently manifests a serious mental illness, abnormality or disorder that impairs his volitional control such that he would have serious difficulty refraining from sexually violent conduct or child molestation if released.

D. Dangerousness And Risk Assessment

All three experts in this case conducted a risk analysis based on empirical tools and actuarial instruments to evaluate, quantify, and support their dangerousness determination. All experts agree that no psychological tests or actuarial instruments have been developed that predict with certainty an individual's risk of future sexual offending behavior.¹⁸³ The actuarial instruments (Static-99R, Static 2002R) provide only group prediction rates on risk of re-offending. These instruments do not provide individual rates of re-offending.

In evaluating Mr. Wooden, all of the experts used a clinical analysis combined with actuarial instruments to determine if Mr. Wooden presents a serious risk of re-offending. The experts agreed on the scoring of Mr. Wooden with the actuarial instruments. The experts agreed that the Static-99R is the best validated instrument

¹⁸³Tr. at 65; Exs. 2, 5, 8.

available at this time. The disagreement arises regarding how best to use Mr. Wooden's scores.

Dr. Malinek examined Mr. Wooden's score of 7 on the Static-99R with reference to the non-routine correctional sample group (the high risk/need group), which has a recidivism rate of 37.9% in 5 years and 48.6% in 10 years.¹⁸⁴

Dr. Ross examined Mr. Wooden's score of 7 on the Static-99R with reference to the pre-selected for treatment group.¹⁸⁵ Among that group an individual with a score of 7 recidivates at a rate of 25.4% in 5 years and 33.3% in 10 years.¹⁸⁶ She also compared Mr. Wooden's score to the high risk/need group and got the same results as did Dr. Malinek.¹⁸⁷ She made that comparison solely because Mr. Wooden had been certified by the BOP as a sexually dangerous person.¹⁸⁸

Dr. Campbell examined Mr. Wooden's score of 7 on the Static-99R with reference to all four sample groups.¹⁸⁹ Because there are no published criteria for determining which sample to use for comparison, Dr. Campbell opines that the only intellectually

¹⁸⁴Ex. 2 at Bates 3326.

¹⁸⁵Ex 5 at Bates 3294.

¹⁸⁶Id.

¹⁸⁷Id.

¹⁸⁸Id.

¹⁸⁹Ex. 8 at Bates 36-42.

honest thing to do is to use all four sample groups for comparison.¹⁹⁰ When comparing Mr. Wooden's score to the routine sample group the 5 year recidivism rate is 22%.¹⁹¹

None of the recidivism rates within the five-year window reaches or exceeds 50%.¹⁹² With such low predictions of recidivism, the actuarial instrument scores alone cannot possibly satisfy the statutory threshold of clear and convincing evidence that Mr. Wooden would have serious difficulty refraining from engaging in sexually violent conduct or child molestation.

v. CONCLUSIONS OF LAW

The Court finds that § 4248 deprives Respondent of equal protection of the law under the Fourteenth and Fifth Amendments to the United States Constitution because there is no rational basis for § 4248's differentiation between individuals in BOP custody and individuals in the general public.

The Court finds that Respondent was deprived of his due process rights under the Fifth Amendment of the United States Constitution because the Government failed to bring Respondent before the Court for civil commitment hearing within a reasonable time prior to the expiration of his sentence. The Government's action in delaying certification insured that Mr. Wooden would

¹⁹⁰Tr. at 217.

¹⁹¹Ex. 8, at Bates 40.

¹⁹²Ex. 8 at Bates 40.

remain incarcerated past his anticipated date of release prior to any judicial hearing on the matter.

The Court finds that Respondent has committed acts of child molestation in the past.

The Court finds that Respondent no longer suffers from pedophilia, antisocial personality disorder, or any other mental illness, abnormality or disorder, either alone or in combination, that could be fairly deemed "serious" within the meaning of 18 U.S.C. § 4247(a)(6).

The Court finds that the Government has not shown by clear and convincing evidence that Mr. Wooden lacks volitional control such that he would have "serious difficulty refraining from sexually violent conduct or child molestation if released."

The United States Supreme Court precedent makes clear that the "serious difficulty" language does not require total or complete lack of control, but does require that it must be difficult, if not impossible, for the person to control his dangerous behavior. See *Kansas v. Crane*, 534 U.S. 407, 411 (2002) (citing *Kansas v. Hendricks*, 521 U.S. 346, 358 (1977)). The conflicting evidence concerning the probability of Mr. Wooden's re-offending cannot support a finding that he would have "serious difficulty" in refraining from child molestation.

The Court has been presented with three opinions about Respondent's risk of re-offense in the event he is released. The

Court has considered the information and finds this information relevant to its determination of Respondent's sexual dangerousness by clear and convincing evidence, but concludes that it is insufficient to justify commitment.

The Court finds persuasive the testimony of Dr. Terence Campbell. Dr. Campbell noted that with the exception of a Christmas card sent to the alleged victim in 2005, Mr. Wooden has shown no recent interest in children. Unlike many men at FCI Butner's Maryland unit, who despite their circumstances continue viewing and creating child pornography, Mr. Wooden has exercised restraint.

The Court also finds compelling the declaration of Dr. Ronald Weiner, who indicates, contrary to Dr. Malinek's assessment, Mr. Wooden showed a desire to change. In addition, the Court noted treatment records of Dr. Weiner which demonstrate the effort Mr. Wooden made toward treatment during his release between 2002 and 2005.

The Court finds that Mr. Wooden's last conviction of child molestation occurred in 1984.

VI. CONCLUSION

1. As set forth in the foregoing findings of fact and conclusions of law, it is hereby **ORDERED, ADJUDGED,**
AND DECREED that the Respondent, Walter Wooden, is not a "sexually dangerous person" within the meaning of 18 U.S.C. § 4248(d);

2. This case is hereby **DISMISSED**;
3. The Government is **ORDERED** to place the Respondent, Walter Wooden, into the custody of the appropriate post-sentence supervision;
4. The Clerk is **DIRECTED** to close this case.

DONE AND ORDERED, this the 30 day of August, 2011.


TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE